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No. 08-322

IN THE
Supreme Court of the United States

NORTHWEST AUSTIN MUNICIPAL UTILITY DISTRICT NUMBER ONE
Appellant,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL.
Appellees.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF *AMICUS CURIAE*[1]

Named for late Associate Justice William J. Brennan, Jr., the Brennan Center for Justice at NYU School of Law is a not-for-profit, nonpartisan public-policy and law institute that focuses on issues of democracy and justice. Through the activities of its Democracy Program, the Brennan Center seeks to bring the ideal of representative self-government closer to reality by working to eliminate barriers to full and equal political participation and to ensure that public policy and institutions reflect the diverse voices and interests that make for a rich and energetic democracy. The Brennan Center has focused extensively on protecting minority voting rights, including by authoring a report on minority representation and reports on other issues relating to voting rights; launching a major, multi-year initiative on redistricting; and participating as counsel or *amicus* in a number of federal and state cases involving voting and election issues.

In order to ensure that Congress retains its full powers to enforce the guarantees of the Fifteenth Amendment, the Brennan Center participated as *amicus curiae* in the summary-judgment proceedings before the district court in this case. In granting summary judgment to the government and intervenors and upholding the constitutionality of

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

Section 5 of the Voting Rights Act, the district court cited with approval the Brennan Center's argument that "'while the Supreme Court has found some statutes were not an appropriate means of enforcing the *Fourteenth Amendment,* the Court has been far more deferential when Congress's *Fifteenth Amendment* powers are at stake.'" *Northwest Austin Mun. Util. Dist. No. One* ("*NAMUDNO*") *v. Mukasey*, 573 F. Supp. 2d 221, 236 (D.D.C. 2008) (quoting Brennan Center *amicus* brief). On appeal, the Brennan Center again submits a brief as *amicus curiae* in support of Appellees and in support of affirmance. In this brief, the Brennan Center addresses the history of the Fifteenth Amendment, which supports the district court's conclusion.

SUMMARY OF ARGUMENT

The history of the Fifteenth Amendment confirms that its framers intended to give Congress broad authority to protect the fundamental right to vote from racial discrimination and fully justifies the special deference this Court has consistently given to Congress's judgments in exercising that authority.

Before passing the Fifteenth Amendment, Congress had extended black enfranchisement as far as it could through ordinary legislation. Although Congress had succeeded in formally enfranchising blacks throughout the former Confederacy and federally controlled territories by the end of 1868, those legal rights were already being undermined by violence and intimidation. The Fifteenth Amendment was intended to consolidate the formal gains that had been previously achieved and ensure

that they were not rolled back by circumvention or by future electoral majorities. At the same time, the enforcement clause of the Fifteenth Amendment was designed to provide Congress with continuing authority to protect black voting rights after it ceded supervisory control over the former Confederacy.

Both Congress and the states recognized that the Fifteenth Amendment represented a fundamental structural change in at least three ways. First, the Amendment enshrined the right to vote as a right of paramount importance to achieving racial equality. Second, the Amendment transferred to the federal government control over an area that had once been left exclusively to the states. And, third, the Amendment provided that Congress would play an ongoing role in protecting the new federal right the Amendment had created. Immediately after the Amendment was ratified, Congress passed a series of vigorous enforcement acts, reflecting the contemporary understanding that the Fifteenth Amendment entrusted to Congress primary responsibility for protecting against racial discrimination in voting and vested Congress with all the powers necessary for accomplishing that task.

In its early decisions examining Congress's enforcement powers, the Supreme Court also recognized that the Fifteenth Amendment represented a major transfer of authority from the states to the federal government and gave Congress broad authority to protect against racial discrimination in voting. Indeed, when Congress passed the Voting Rights Act in 1965, the Senate and House Reports noted that "[n]o statute confined to

enforcing the 15th amendment exemption from racial discrimination in voting has ever been voided by the Supreme Court." S. Rep. No. 89-162, at 17 (1965); H.R. Rep. No. 89-439, at 17 (1965). That observation remains true to this day.

The history and structure of the Fifteenth Amendment demonstrate that Congress's decision to extend the temporary provisions of the Voting Rights Act should be accorded special deference. Section 5 of the Voting Rights Act (both as originally enacted and as reenacted) addresses the same concerns that animated the framers of the Fifteenth Amendment. Congress, which is entrusted with critical responsibility for enforcing the Fifteenth Amendment, has once again determined, based on an extensive record, that the protections of Section 5 are necessary to prevent hard-won gains in voting rights from being eroded or undermined. This Court should defer to that legislative judgment and reject NAMUDNO's constitutional challenge.

ARGUMENT

I. The Fifteenth Amendment Was Enacted to Prevent Recent Gains in Enfranchisement From Being Eroded by Southern Resistance or Future Electoral Rollbacks.

Congress passed the Fifteenth Amendment immediately after the 1868 elections at the end of a two-year period in which it had expanded black enfranchisement as far as possible through ordinary legislation. Congress viewed the recent gains in black enfranchisement as fragile and tenuous. Because it was uncertain whether the Fourteenth

Amendment would fully protect such rights, Congress believed that only another amendment establishing robust federal authority could safeguard against racial discrimination in voting and preserve Congress's role in protecting enfranchisement as the former Confederate states were re-assimilated into the Union. Section 1 of the Amendment instituted a self-executing nation-wide ban on racial discrimination in voting. And Section 2 of the Amendment provided Congress with additional power to enforce the Amendment through "appropriate legislation." U.S. Const. amend. XV, § 2.

A. Before Passing the Fifteenth Amendment, Congress Enacted Aggressive Statutes Regulating the Franchise in Federally Controlled Areas.

At the beginning of 1867, a mere two years before Congress passed the Fifteenth Amendment, and just three years before the Amendment cleared the threshold of state ratifications, federal law did not guarantee the voting rights of any black persons. Congress enacted a series of aggressive statutes in 1867 and 1868 designed to extend black male enfranchisement as far as Republicans believed possible without another constitutional amendment—namely, in territories over which Congress had plenary control and in the former states of the Confederacy under Reconstruction.

Congress also provided mechanisms to enforce this right.[2]

Congress first passed legislation enfranchising blacks in the District of Columbia. *See* An Act to Regulate the Elective Franchise in the District of Columbia, ch. 6, 14 Stat. 375 (1867).[3] Enfranchisement alone was revolutionary enough. *See* Cong. Globe, 39th Cong., 2d Sess. 107 (1866) (statement of Sen. Sumner) ("Here in the District of Columbia we begin the real work of reconstruction by which the union will be consolidated forever."). But Congress recognized that enfranchisement on paper would not necessarily produce enfranchisement in practice. The District of Columbia suffrage bill therefore included two sections penalizing interference with the voting rights established by the

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[2] Although U.S. Const. art. I, § 4, and U.S. Const. art II, § 1, cl. 4, gave Congress power to regulate federal elections, those powers did not apply to elections of state officials. And, even with respect to federal elections, Congress had not frequently used its Article I powers. Congress did not pass any regulations of federal elections until 1842 and did not pass comprehensive regulations until 1870 as part of the First Enforcement Act. *See Ex parte Siebold*, 100 U.S. 371, 382-84 (1879); *Ex parte Yarbrough (The Ku Klux Cases)*, 110 U.S. 651, 662 (1884) (noting that, before the Enforcement Acts, Congress had, "through long habit and long years of forbearance . . . in deference and respect to the states, refrained from the exercise of these powers").

[3] Subject to restrictions on age, duration of residency, criminal history, and other such factors, the Act stated that "each and every male person . . . shall be entitled to the elective franchise, and shall be deemed an elector and entitled to vote at any election in said District, without any distinction on account of color or race." 14 Stat. 375, § 1.

Act.[4] From the very beginning, Congress thus recognized that the success of voting rights laws depended on forceful legislation, including ancillary civil and criminal enforcement mechanisms, to ensure that those rights could be meaningfully exercised.

To enact the District of Columbia suffrage bill, Congress had to override a presidential veto. *See* William Gillette, *The Right to Vote: Politics and the Passage of the Fifteenth Amendment* 30 (1965). That same month, Congress overrode a second presidential veto and passed legislation giving blacks the right to vote in other geographic areas subject to federal control. *See* An Act to Regulate the Elective Franchise in the Territories of the United States, ch. 15, 14 Stat. 379 (1867). And just two weeks later, Congress required that the Territory of Nebraska abolish all racial qualifications on voting before it could be admitted into the Union. *See* An Act for the

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[4] Sections 2 and 3 of the District of Columbia suffrage bill read:

> [A]ny person whose duty it shall be to receive votes at any election within the District of Columbia, who shall willfully refuse to receive, or who shall willfully reject, the vote of any person entitled to such right under this act, shall be liable [criminally and in tort].

14 Stat. 375, § 2.

> [I]f any person or persons shall willfully interrupt or disturb any such elector in the exercise of such franchise, he or they shall be deemed guilty of a misdemeanor . . . .

Id. § 3.

Admission of the Territory of Nebraska into the Union, ch. 36, 14 Stat. 391, § 3 (1867) ("[T]his act shall not take effect except upon the fundamental condition that within the State of Nebraska there shall be no denial of the elective franchise, or of any other right, to any person, by reason of race or color, excepting Indians not taxed.").

Most significantly, in the First Reconstruction Act Congress refused to re-admit the former Confederate states into the Union unless the states amended their constitutions to allow voting by male citizens "of whatever race, color, or previous condition." An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428, § 5 (1867) ("First Reconstruction Act"). Recognizing the possibility of backsliding, Congress also required that, in the future, "the constitutions of neither of [the readmitted states] shall ever be so amended or changed as to deprive any citizen or class of citizens of the United States of the right to vote in said State." *E.g.*, An Act to Admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida to Representation in Congress, ch. 70, 15 Stat. 73, § 1 (1868). Congress was acutely aware that the fragile gains it had achieved could easily be rolled back if left unprotected and, as discussed below, ultimately found it necessary to adopt a constitutional amendment to solidify its own powers to guarantee such protection.

B. Southern Violence and Intimidation Threatened to Undermine Recent Gains in Enfranchisement.

Although Congress had succeeded in formally enfranchising blacks throughout the former Confederacy and federally controlled territories by the end of 1868, those legal rights were already being undermined by violence and intimidation. The period leading up to the 1868 election saw one of the greatest waves of racial violence in American history. At least 65 blacks were lynched in 1868 in Louisiana alone, most in the six-month period from May to November immediately leading up to the elections. Gilles Vandal, *Rethinking Southern Violence* 93-94 (2000). In northern Alabama, the Ku Klux Klan spread "a nameless terror among negroes, poor whites," and other prospective Republican voters. Allen W. Trelease, *White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction* 101 (1971). In Camilla, Georgia, "400 armed whites, led by the local sheriff, opened fire on a black election parade"; similar riots rocked Pulaski, Tennessee (the birthplace of the Klan), St. Landry Parish, Louisiana, and dozens of other communities. Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* 342 (1st Perennial Classic ed. 2002).

The connection between violence and suffrage was both explicit and pervasive. L.N. Trammell, who eventually became president of the Senate when the Democrats gained control in 1871, demanded in March 1868 that "'the negroes should as far as possible be kept from the polls,'" adding that "'the

organization of the KKK might effect this more than anything else.'" Laughlin McDonald, *A Voting Rights Odyssey: Black Enfranchisement in Georgia* 21 (2003); *see also* Lee W. Formwalt, *The Camilla Massacre of 1868: Racial Violence as Political Propaganda*, 71 Ga. Hist. Q. 400, 402-03 (1987). Republicans in Georgia and Louisiana abandoned their campaigns because they were "[u]nable to hold meetings and fearful that attempts to bring out their vote would only result in further massacres." Foner, *Reconstruction*, at 342.

The southern resistance did not end once the ballots were counted. In 1868, the Klan assassinated a black Republican congressman from Arkansas and three black members of the South Carolina state legislature. Charles Lane, *The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction* 3 (2008). And in the summer of 1868, Georgia's governor—despite the State's ratification of the Fourteenth Amendment—asserted that the state constitution did not permit blacks to hold legislative office and expelled 32 black representatives from the state assembly, prompting Congress to place Georgia under military rule. *See* McDonald, *Voting Rights Odyssey*, at 23.

The Congress that drafted the Fifteenth Amendment was well aware of this devastating bloodshed and properly understood it as an effort to nullify the First Reconstruction Act's establishment of voting rights for southern blacks. *See* Foner, *Reconstruction*, at 342-44; Angela Behrens, Christopher Uggen, & Jeff Manza, *Ballot Manipulation and the 'Menace of Negro Domination':*

Racial Threat and Felon Disenfranchisement, 1850-2002, 109 Am. J. Soc. 559, 560 (2003).

C. Congress Was Concerned that Its Pre-Fifteenth Amendment Powers Were Inadequate to Protect Enfranchisement in States Readmitted Into the Union.

In addition to private violence, Congress also faced a looming structural problem. As the Confederate states began to be re-assimilated into the Union, Republicans were concerned that Congress's constitutional power to protect black enfranchisement would vanish. "Now that most of the ex-Confederate States had been in measure rehabilitated it was realized that the practically complete control which Congress had exercised over them was gradually slipping away and must eventually come to an end." John Mabry Mathews, *Legislative and Judicial History of the Fifteenth Amendment* 20 (1909). In theory, the former Confederate states were bound in perpetuity never to amend their constitutions to disenfranchise their citizens on account of race, but "[t]he fear was freely expressed however that the theory of the equality of the States was too deeply rooted in our constitutional system ever to make the observance of such a condition practically enforceable." *Id.* at 18.

Once the former Confederate states were readmitted into the Union, the source of the legal authority to protect suffrage on an ongoing basis became less clear. At a time when enforcement was most needed, Congress thus faced the possibility of losing its legal authority to protect the right to vote.

The Fifteenth Amendment was therefore necessary to "supply[] a new basis for the continuance of congressional control over the suffrage conditions of the Southern States. This basis could be surely and safely supplied only by means of a new grant of power from the nation in the form of a suffrage amendment to the Constitution which should contain the authorization to Congress to enforce its provisions." *Id.* at 21.

The Amendment would also enfranchise blacks in the Northern states, most of which still prohibited blacks from voting. From 1865 to 1869, white voters in the northern states had rejected eight of eleven state referenda that would have ended racial restrictions on voting. J. Morgan Kousser, *The Voting Rights Act and the Two Reconstructions*, *in* Bernard Grofman & Chandler Davidson, eds., *Controversies in Minority Voting: The Voting Rights Act in Perspective* 137 (1992). Congressional Republicans believed that only a constitutional amendment would empower Congress to override these referenda and enfranchise blacks in the loyal states that had never seceded. *See* Cong. Globe, 40th Cong., 3d Sess. 555 (1869) (statement of Rep Boutwell) (arguing that, without a constitutional amendment, "the subject is not within the proper scope of legislative power, and that the only way to secure the equality of suffrage to the people of this country, without distinction of race or color, is by an amendment to the Constitution").

D. The Fifteenth Amendment Was Designed to Set a Baseline Guarantee Against Racial Discrimination in Voting and to Ensure that Congress Would Retain the Constitutional Powers to Protect that Right.

Against this backdrop, the two clauses of the Fifteenth Amendment served complementary purposes. First, the substantive guarantee in the first section of the Amendment would consolidate the formal gains that had been previously made and ensure that they were not rolled back by future electoral majorities. "Republicans sensed that control of the national government might be slipping from their grasp, that white Southerners were intensifying their opposition to black equality, and that something had to be done to guarantee black political rights, particularly in the event that the Democrats returned to power in the South or nationally." Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States* 93-94 (2000). The Amendment would set a constitutional floor to "make it impossible, if the Democrats ever returned to power in Washington, to repudiate Negro voting, North or South." Gillette, *Right to Vote,* at 73; *see also* Cong. Globe, 40th Cong., 3d Sess. app. 97 (1869) (statement of Rep. Bowen) ("This rule . . . should be established by constitutional amendment . . . otherwise it will be subject to change, and thus of uncertain duration and use."); *id.* at app. 102 (statement of Rep. Broomall) ("Laws may be repealed, and it is not advisable that so important a principle of republican

government should be left to the caprices of party. Its proper place is in the organic law.").

Second, the enforcement power provided in the Amendment would give Congress continuing constitutional power to protect black suffrage even once it ceded supervisory control over the former Confederacy. The Amendment would give Congress "a general commission to make detailed statutes" protecting against racial discrimination in voting. Richard Vallely, *The Two Reconstructions: The Struggle for Black Enfranchisement* 103 (2004). The power given to Congress to protect the franchise thus provided an "alternative to . . . the continued military occupation of the South." Vikram D. Amar & Alan E. Brownstein, *The Hybrid Nature of Political Rights*, 50 Stan. L. Rev. 915, 940-41 (1998). And it would give Congress power to protect the right to vote in the North, where elections had been under the exclusive control of the states. Gillette, *Right to Vote,* at 73.

Together, by creating a nation-wide ban on racial discrimination in voting and providing Congress a new source of power to enforce that right, the provisions of the Fifteenth Amendment were designed to ensure that recent gains in enfranchisement would be doubly protected, both from future electoral rollbacks and from attempts to undermine the formal promise of racial equality in voting.

II. The Fifteenth Amendment Marked a Fundamental Structural Change with Respect to Congress's Role in Protecting the Right to Vote.

The Fifteenth Amendment represented a fundamental structural change in at least three ways. First, the Amendment enshrined the right to vote as a right essential to achieving racial equality. Second, the Amendment transferred to the federal government control over an area that had once been left to the exclusive control of the states. And, third, the Amendment provided that Congress would take a primary role in protecting the new federal rights the Amendment had created.

A. The Fifteenth Amendment Codified the Fundamental Importance of the Right to Vote.

The Republicans who championed the Fifteenth Amendment viewed the franchise as "[t]he centerpiece of Reconstruction." Kousser, *Voting Rights Act and Two Reconstructions*, at 136. They sought to leave nothing to chance in ensuring that the foundational principle of electoral equality received full constitutional protection, both in theory and in practice.

Through the Fourteenth Amendment, Congress and the states had already guaranteed equal protection generally. But the framers of the Fifteenth Amendment singled out the right to vote for special protection. They recognized the right to vote as a foundational right needed to secure all others. "Without the elective franchise," they asked, "what insurance has a man of his life, what security for his liberties, what protection in his pursuit of

happiness?" Cong. Globe, 40th Cong., 3d Sess. app. 100 (1869) (statement of Rep. Hamilton). Congress knew that the ballot box would ultimately provide more lasting protections than piecemeal legislation: "the ballot was absolutely essential to [the] protection against oppression and wrong in a thousand forms where the general law would be powerless." Thomas M. Cooley, *Impartial Suffrage Established*, *in* II Joseph Story & Melville Madison Bigelow, eds., *Commentaries on the Constitution of the United States* 718 (5th ed. 1891). "A man with a ballot in his hand is the master of the situation. He defines all his other rights. What is not already given him, he takes. . . . The Ballot is opportunity, education, fair play, right to office, and elbow-room." William Gillette, *Retreat from Reconstruction, 1869-1879* 23 (1979) (quoting Wendell Phillips).

Supporters also viewed the right to vote as a source of empowerment for the recently freed slaves. The Amendment would "place in the hand of the black man of Georgia a rod of power before which all politicians quail"—a certain vote. Cong. Globe, 40th Cong., 3d Sess. 1629 (1869) (statement of Sen. Stewart). Republicans believed that equal suffrage would "'confer[] upon the African race the care of its own destiny. It places their fortunes in their own hands.'" Foner, *Reconstruction,* at 449 (quoting then-Congressman James Garfield).

Finally, the Amendment's supporters saw political equality as a critical step towards achieving social equality. "[T]he ballot . . . is at once authority and protection, a badge of power, and a shield of defense, a schoolmaster for the ignorant, a lifter-up

of the lowly, and a bond of fraternal union for all." Cong. Globe, 40th Cong., 3d Sess. app. 146 (1869) (statement of Rep. French). As Representative Whittemore urged: "Give the colored man his vote; then and not till then will disloyalty be crushed; . . . then and not till then will the material which feeds the flame of partisan and sectional strife be removed forever." *Id.* at app. 93.

By codifying a prohibition on racial discrimination in voting as part of the Constitution, the framers of the Fifteenth Amendment thus singled out the right to vote as a uniquely important right. The Fifteenth Amendment enshrined the right to vote as a centerpiece of Reconstruction and as a foundational constitutional guarantee of racial equality.[5]

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[5] The debates surrounding the passage of the Fifteenth Amendment make clear that the final version of the Amendment was also understood to protect racial groups other than those of African descent. *See Extension of the Voting Rights Act of 1965: Hearing Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 94th Cong. 698 (1975) (noting that some legislators opposed the Fifteenth Amendment precisely because it would protect more than just blacks and that California and Oregon refused to ratify the Amendment because of "fear that it would lead to enfranchisement of Chinese Persons"). Indeed, the Reconstruction Senate "twice rejected . . . a provision which stated that: 'Citizens . . . of African descent shall have the same right to hold office . . . as other citizens.'" *Id.* Additionally, this Court's precedent establishes that Latinos, Asian Americans, and Native Americans are protected by the Fifteenth Amendment. *See Rice v. Cayetano*, 528 U.S. 495, 514 (2000) (holding that because "[a]ncestry can be a proxy for a race,"

B. The Fifteenth Amendment Made Racial Discrimination in Voting a Central Concern of the Federal Government.

The Fifteenth Amendment radically altered the balance of power between the federal government and the states with respect to regulations of the voting franchise. The Amendment was passed against a status quo in which the states had exercised control over the franchise and Congress's control, as a practical matter, had been limited to protecting the right to vote in federal territories. The Fifteenth Amendment broke with that status quo by transferring ultimate power to protect against racial discrimination in voting away from the states and to the federal government—even with respect to the States' own elections. The Congress that passed the Fifteenth Amendment and the states that ratified it determined that the traditional federal-state balance had been insufficient to protect against racial discrimination in voting.

As late as 1866, even among northern Republicans, "[t]here was a feeling too widespread to be safely antagonized that the regulation of the suffrage was a matter properly belonging to the state governments." Mathews, *History of the Fifteenth Amendment,* at 12. But the Fifteenth Amendment broke with those past assumptions. "The fact . . . that the national legislature was authorized to enforce the prohibition upon the States carried the

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discrimination based on common ancestry or culture violates the Fifteenth Amendment).

national power over suffrage into a sphere whither it had not previously extended." *Id.* at 36.

It was recognized both by the Amendment's supporters and opponents that the Amendment would transfer to the federal government responsibility over an area that had once been left exclusively to the states. For example, Senator John Pool, a strong supporter of the Amendment, explained that: "If a State by omission neglects to give every citizen within its borders a free, fair, and full exercise and enjoyment of his rights, it is the duty of the United States Government to go into the State." Xi Wang, *The Making of Federal Enforcement Laws, 1870-1872*, 70 Chi.-Kent L. Rev. 1013, 1030 (1995). Similarly, Senator Bayard, an opponent of the proposed Amendment, contrasted the power provided by the Amendment with the autonomy states had previously enjoyed over their own elections: "The Federal Government in the past has neither attempted to usurp the power as within the limits of the Constitution, nor has it been yielded by the States or their people." Cong. Globe, 40th Cong., 3d Sess. app. 166 (1869).

Even some abolitionists and former Republicans protested the Amendment's intrusion on principles of state sovereignty. James Doolittle, a Wisconsin Republican who supported the abolition of slavery but believed questions of voting were best left to the states, predicted that the power to enforce the Fifteenth Amendment would give Congress complete control over state elections:

> [T]he power to enforce it of necessity implies power over the elections of the States. In order to give the colored man of the States the right to vote at the elections in the States, to secure to his vote a fair count, and to make sure that if his vote be counted and determine the result that the person elected shall have the office, will draw to this Government the power to control the elections themselves. It is impossible to separate the two.

Id. at app. 151. Similarly, James Dixon, a disillusioned former Republican who had recently switched parties, envisioned federal laws usurping state sovereignty over their own elections:

> It is not a question of negro suffrage alone, it is a question of suffrage in its widest sense. . . . It is the question who shall be the voter. It is the question of suffrage in the State of Connecticut, and by whom shall its regulation be established? That, the people of Connecticut will remember, is the question which is presented now, whether the Congress of the United States and the people of all the States of the United States shall invade the borders of that ancient republic and compel her to change her laws.

Id. at 861.

Both the proponents and opponents of the Fifteenth Amendment thus understood the Amendment to dramatically alter the status quo by installing the federal government, and Congress in particular, as the ultimate protector against racial

discrimination in voting. The Amendment carved out an area once believed to belong exclusively to the states and transferred power from the states to the federal government. As the Supreme Court recognized soon after the Amendment's passage: "The fifteenth amendment of the constitution, by its limitation on the power of the states in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the states." *Ex parte Yarbrough (The Ku Klux Cases)*, 110 U.S. 651, 664 (1884).

C. The Fifteenth Amendment Vested Congress with Primary Responsibility for Enforcing the Amendment's Guarantees.

Finally, the Amendment vested Congress with primary authority for enforcing the new constitutional guarantee against racial discrimination in voting and with wide remedial powers to achieve that goal. Congress knew from the beginning, based on its experience with prior efforts to enfranchise blacks in the District of Columbia, federal territories, and former Confederate states, that the Fifteenth Amendment would require a vigorous enforcement mechanism. "[T]here was never any difference of opinion among the friends of the measure, either as to the desirability of including . . . [an enforcement provision] in the Amendment or as to the form which it should assume." Mathews, *History of the Fifteenth Amendment*, at 36 n.55.

The Amendment set a constitutional floor prohibiting discrimination but also empowered Congress to take those steps it believed important to preclude such discrimination. Republicans who preferred a broader constitutional amendment were willing to accept a narrower version of Section 1 precisely because Section 2 would provide Congress with additional enforcement power to transform the negatively phrased Section 1 into a positive guarantee:

> If there were nothing at all here except the first section I might see a great deal of weight in [a concern that section 1's purely negative formulation leaves states able to devise indirect means of disenfranchising African-Americans]. But there happens to be added to that a second section, giving to Congress the express power to enforce the prohibition. The result of the whole matter is that if we amend this first section [to a form almost identical to the one ultimately enacted], . . . by the second section Congress is invested with express authority to enforce the limitation.

Cong. Globe, 40th Cong., 3d Sess. 727 (1869) (statement of Rep. Bingham); *see also id.* at 1625 (statement of Sen. Howard).

Opponents of the Amendment similarly noted that the enforcement clause would give Congress substantial discretion to determine the scope of its own enforcement power. *See id.* at app. 163 (statement of Sen. Saulsbury) (warning that enforcement clause language "leav[es] [the]

legitimate and proper meaning [of 'appropriate' legislation] to be determined by each particular head in this Senate Chamber and in the House of Representatives" and asking "[u]nder the exercise of the power to carry this amendment into execution by appropriate legislation what cannot you do?") .

Almost immediately after the Amendment was ratified, Congress enacted the Enforcement Act of 1870, which reflected Congress's belief that the Amendment was designed to give Congress broad enforcement powers to pass affirmative legislation protecting against racial discrimination in voting. *See* Mathews, *History of the Fifteenth Amendment*, at 78-79. Supporters of the bill, almost all of whom had voted for the Amendment sixteen months earlier, invoked Congress's broad power when discussing the Act. For example, Senator Carpenter stated that "[t]his amendment to the Constitution is ample and full, and clothes Congress with all power to secure the end which it declares shall be accomplished." Cong. Globe, 41st Cong., 2d Sess. 3563 (1870). Representative Davis similarly argued that "[i]n amending the Constitution of the United States the people have seen fit to clothe Congress with the power to enforce by appropriate legislation. . . . No broader language could be adopted than this with which to clothe Congress with power." *Id.* at 3882.

Senator Morton referenced "the spirit and the true intent of the fifteenth amendment" while rebutting arguments that the 1870 enforcement legislation intruded too far on the sovereignty of the states. Invoking the 1868 debates, Morton argued

that the Amendment's purpose was to ensure that "the colored man, so far as voting is concerned, shall be placed upon the same level and footing with the white man, and that Congress shall have the power to secure him that right. . . . We know that the second Section was put there for the purpose of enabling Congress itself to carry out the provision. It was not to be left to State legislation." *Id.* at 3670. And Senator Howard similarly warned that the Amendment should not be given a "narrow construction" that would prevent Congress from "apply[ing] the remedies which are proper in the case to punish individuals for interrupting, preventing, delaying, or hindering the colored man from the peaceful and free exercise of his right of suffrage; which was the great object we had in view in proposing this amendment to the people of the United States." *Id.* at 3655.

Congress ultimately enacted seven suffrage-related sections as part of the 1870 Enforcement Act, powerfully demonstrating that the Forty-First Congress viewed the Fifteenth Amendment's enforcement clause as a substantial source of authority. *See* Act of May 31, 1870, ch. 114, 16 Stat. 140. Section 1 of the Act simply restated the core principle behind the Fifteenth Amendment without creating any enforceable rights. But each of the other six sections contained an aggressive, affirmative mandate that was national in scope. These provisions were designed not merely to ensure that voting rights remained formally intact, but to ensure that neither states nor private actors took

steps to undermine the effectiveness of those voting rights.

Sections 2 and 3 of the Enforcement Act prohibited discrimination in voter registration. Section 2 imposed a positive duty on state election officials "to give to all citizens of the United States the same and equal opportunity to perform" any prerequisite to voting, such as paying a poll tax or passing a literacy test, "and to become qualified to vote without distinction of race, color, or previous condition of servitude." 16 Stat. 140, § 2. Section 3 provided that a person denied the opportunity to perform a prerequisite to voting "by reason of the wrongful act or omission" of anyone involved in the registration process "shall be entitled to vote in the same manner and to the same extent as if he had in fact performed" the prerequisite. *Id.* § 3.

The next three sections targeted violence and intimidation aimed at suppressing the vote. Section 4 barred "any person, by force, bribery, threats, intimidation or other unlawful means" from "prevent[ing] or obstruct[ing]" citizens from performing any prerequisite or from voting. *Id.* § 4. Section 5 precluded landlords and employers from retaliating against their tenants and employees in order to "prevent, hinder, control or intimidate . . . any person from exercising . . . the right of suffrage, to whom the right of suffrage is secured or guaranteed by the fifteenth amendment." *Id.* § 5. Section 6, which enforced rights under the Fourteenth Amendment as well as the Fifteenth, outlawed conspiracies "to injure, oppress, threaten, or intimidate any citizen with intent to prevent or

hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same." *Id.* § 6.

Finally, Section 23 permitted a candidate for office who lost "by reason of the denial to any citizen or citizens . . . of the right to vote, on account of race, color, or previous condition of servitude" to sue to "recover possession" of the office. *Id.* § 23. Congress thus empowered the federal courts to nullify state election results if those results were tainted by racial disenfranchisement.

Taken together, this set of bold provisions make clear that the contemporary Congress was not "constrained by traditional theories of federalism." Kousser, *Voting Rights Act and Two Reconstructions*, at 139. Congress understood its enforcement power to be extremely broad, encompassing a range of prophylactic measures not compelled by Section 1 of the Amendment but which Congress deemed necessary to achieve the Amendment's objectives.

A year after passing the 1870 Enforcement Act, Congress went even further, amending Section 20 of the Act to place congressional elections more firmly under federal control. Act of Feb. 28, 1871, ch. 99, 16 Stat. 433 ("1871 Enforcement Act"). These amendments provided for detailed supervisory powers over the electoral process, from registration to the certification of returns. The statute provided that if any two citizens of a city or town "make known, in writing, to the judge of the circuit court of

the United States for the circuit wherein such city or town shall be, their desire to have [a] registration, or [an] election, or both, guarded and scrutinized," then the judge shall appoint a supervisor. *Id.* § 2. The supervisors' duties were described in detail and included personally scrutinizing and counting ballots, making returns, keeping the peace, and preventing fraud. *See* VI James Ford Rhodes, *History of the United States from the Compromise of 1850 to the McKinley-Bryan Campaign of 1896* 423 (1906) ("A host of supervisors were to be appointed by the judges of the United States courts who should see that the voting was fair and the count honest."). These broad enforcement acts "were comprehensive . . . but the fact is that they did not go beyond the intent of the Fifteenth Amendment." Everette Swinney, *Enforcing the Fifteenth Amendment, 1870-1877*, 28 J. So. Hist. 202, 204 (1962).

In addition to the provisions in the 1871 Enforcement Act, in the Ku Klux Klan Act of 1871, Congress authorized the President to deploy the army to respond to "insurrection, domestic violence, unlawful combinations, or conspiracies" that had the effect of depriving citizens of "any of the rights, privileges, or immunities, or protection, named in the Constitution and secured by this act," including the Fifteenth Amendment's guarantee of equal suffrage. Act of Apr. 20, 1871, ch. 22, 17 Stat. 13, § 3.

These enforcement laws, which were enacted by substantially the same Congress that drafted the Fifteenth Amendment, are entitled to special weight in construing the Amendment. Like the first Congress in 1789, the Congress in 1870 "must have

felt, with peculiar force, the obligation of providing efficient means by which [a] great constitutional privilege should receive life and activity." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807); *cf. Marsh v. Chambers*, 463 U.S. 783, 790 (1983) ("An act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its meaning.'" (quoting *Wisconsin v. Pelican Ins. Co.*, 124 U.S. 165, 297 (1888))). The enforcement legislation reflects the contemporary understanding that the Fifteenth Amendment entrusted to Congress primary responsibility for protecting against racial discrimination in voting and vested Congress with all the powers necessary for accomplishing that task.

III. Early Supreme Court Precedent Recognized that the Fifteenth Amendment Vested Congress with Especially Broad Powers to Protect Against Racial Discrimination in Voting.

The Supreme Court shared the contemporary understanding that the Fifteenth Amendment represented a major transfer of authority from the states to the federal government and vested Congress with broad powers to enforce the Amendment's prohibition on racial discrimination in voting. Even as it placed severe restrictions on Congress's efforts to enforce the Reconstruction Amendments in the 1870s and 1880s, the Court signaled that Congress's authority to enforce the

Fifteenth Amendment was even greater than its authority to enforce the Fourteenth Amendment.

The Court's decision in *United States v. Cruikshank*, 92 U.S. 542 (1876), illustrates its differing approaches to the Fourteenth and Fifteenth Amendments. The Court in *Cruikshank* overturned the convictions of white supremacists who led the infamous Colfax Massacre, "the bloodiest single act of carnage in all of Reconstruction," Foner, *Reconstruction*, at 530, and "the largest murder of African Americans in American history," Kousser, *Voting Rights Act and Two Reconstructions*, at 160. While the decision had "disastrous" results for Reconstruction, for example, by imposing insurmountable burdens of proof on the prosecution, *id.*, it actually upheld the constitutionality of the Enforcement Acts and affirmed that Congress had particularly broad authority with respect to the Fifteenth Amendment. "[B]uried in an otherwise devastating opinion, the Supreme Court expressly accepted national action as part of the 'protecting power of Congress'—which is exactly what had been at stake during this period." Vallely, *Two Reconstructions*, at 119; *see* Robert M. Goldman, *Reconstruction and Black Suffrage: Losing the Vote in* Reese *and* Cruikshank 106 (2001) (noting that *Cruikshank* was a surprisingly "narrow" decision that "clearly and explicitly confirmed congressional authority" to protect against racial discrimination in voting).

The defendants in *Cruikshank* were charged with violating the constitutional rights of the black victims they had killed. In examining the 32-count

indictment, the *Cruikshank* Court used a markedly different analytical approach depending on whether a count of the indictment implicated the Fourteenth Amendment or the Fifteenth. With respect to counts of the indictment that sought to enforce the Fourteenth Amendment against non-state actors, the Court invalidated the Enforcement Act as beyond Congress's powers. According to the Court, the Fourteenth Amendment did not create any new federal constitutional rights enforceable against individuals. Black citizens had to look to the state to protect their freedom of assembly, right to bear arms, and right to life, liberty, and property. The Court stated that none of those rights was "committed by the people to the protection of Congress" or "within the general scope of the authority granted to national government." *Cruikshank*, 92 U.S. at 552. The opinion thus "systematically shattered the implicit justification in Reconstruction constitutionalism of every count, except for those based on the Fifteenth Amendment." Vallely, *Two Reconstructions*, at 118.

The Court also found the counts based on the Fifteenth Amendment deficient, but it did so through a crabbed reading of the indictment, while affirming the breadth of Congress's enforcement power. The Court pointedly did not invalidate Congress's power to protect equal suffrage and affirmed that the Fifteenth Amendment (unlike the Fourteenth) did create "a new constitutional right" that Congress could protect against individual interference. *Cruikshank*, 92 U.S. at 555. The Fifteenth Amendment, the Court explained, had established

the "exemption from discrimination in the exercise of" the right to vote as a "necessary attribute of national citizenship." *Id.* at 555-56. Congress had primary responsibility for protecting against racial discrimination in voting because "[t]he right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States." *Id.* at 556. And within this intersection of race and voting, primary responsibility was vested in Congress, not the states.

Instead of declaring that Congress lacked the power to enforce the Fifteenth Amendment, the *Cruikshank* Court invalidated the convictions on technical grounds, leaving the Enforcement Act on the books and allowing future prosecutions to continue. *See* Lane, *The Day Freedom Died*, at 251-52; Goldman, *Reconstruction and Black Suffrage*, at 109.[6] The Court asserted that the indictment was flawed because it did not specifically allege "that the

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[6] The same day that it decided *Cruikshank*, the Court, in *United States v. Reese*, 92 U.S. 214 (1875), invalidated a portion of the Enforcement Act on vagueness grounds because the text of the statute did not clearly indicate whether it covered all deprivations of the right to vote or solely deprivations made on account of race. Rather than adopting a limiting construction requiring that the deprivation be made on account of race, the Court invalidated the applicable sections. *Id.* at 221. Congress promptly reenacted the portions of the Enforcement Act voided in *Reese* two months after the Court's decision. "The two new sections, 5506 and 5507 of what were now known as the Revised Statutes, were more specific than the earlier sections voided by the Court, but were still based on the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment." Goldman, *Reconstruction and Black Suffrage*, at 109 (internal quotation marks omitted).

intent of the defendants was to prevent these parties from exercising their right to vote on account of their race." *Cruikshank*, 92 U.S. at 556. The Court stated that "[w]e may suspect that race was the cause of the hostility, but it is not so averred." *Id.* Commentators have criticized the Court's strained reading of the indictment as "deeply disturbing": "If 105 black bodies did not prove racial animosity, what would?" Kousser, *Voting Rights Act and Two Reconstructions*, at 161. Judge Hugh Lennox Bond even sent a private letter to Chief Justice Waite referring to the *Cruikshank* opinion as a "'Dred' decision." Lane, *The Day Freedom Died*, at 247. But, despite the heavy burden of proof imposed on prosecutors, the government continued to obtain convictions under the Enforcement Act through the administrations of Presidents Hayes, Garfield, and Arthur. *Id.* at 251.[7]

The history of the Fifteenth Amendment thus shows that whatever the limits on Fourteenth Amendment enforcement powers, Congress's Fifteenth Amendment power is a sweeping power so long as Congress is acting to prevent racial discrimination in voting. "On the rare occasions when the Court has found an unconstitutional exercise of [Fifteenth Amendment] powers, in its

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[7] As a doctrinal matter, subsequent cases following *Reese* and *Cruickshank* have cast doubt on whether the Fifteenth Amendment empowers Congress to address private conduct. *See James v. Bowman*, 190 U.S. 127 (1903). But whether or not the doctrinal views of *Reese* and *Cruikshank* that the Fifteenth Amendment reaches private conduct remain good law, the cases reflect as a historical matter the contemporary understanding of the Supreme Court.

opinion Congress had attacked evils not comprehended by the Fifteenth Amendment." *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966). Indeed, when Congress passed the Voting Rights Act in 1965, the Senate and House Reports noted that "[n]o statute confined to enforcing the 15th amendment exemption from racial discrimination in voting has ever been voided by the Supreme Court." S. Rep. No. 89-162, at 17 (1965); H.R. Rep. No. 89-439, at 17 (1965).

IV. Congress's Enforcement of the Fifteenth Amendment Is Entitled to Special Deference.

The history of the Fifteenth Amendment and the structural changes it created indicate that Congress should be afforded special deference in enforcing the Fifteenth Amendment's prohibition on racial discrimination in voting. The Fifteenth Amendment is a narrowly targeted provision designed to protect a right of extreme national importance. Perhaps more than any of the other Reconstruction Amendments, the Fifteenth Amendment carved out an area that had traditionally been left exclusively to the states and transferred primary control to the federal government. Indeed, the Fifteenth Amendment was designed for the very purpose of altering the federal-state balance to allow Congress to continue to protect the right to vote even once the former Confederacy was re-integrated into the Union.

The structure of the Fifteenth Amendment further justifies such deference. Unlike the Fourteenth Amendment, where the Court must define the scope of such broad phrases as "equal

protection" and "due process," the framers of the Fifteenth Amendment defined its substance in simple, straightforward terms. The focus on a single, fundamental right inherently cabins Congress's enforcement power to a relatively narrow but critical area. Because the Fifteenth Amendment is limited to the narrow subject of racial discrimination in voting, there is no risk that Congress could use the Fifteenth Amendment to "prescribe uniform national laws with respect to life, liberty, and property," *City of Boerne v. Flores*, 521 U.S. 507, 523 (1997), or "rewrite the Bill of Rights," *Tennessee v. Lane*, 541 U.S. 509, 556 (2004) (Scalia, J., dissenting). In other words, because the Amendment operates only within a limited sphere of the intersection of racial discrimination and the right to vote, Congress's sweeping powers to enforce the Amendment do not pose any risk of undermining general principles of federalism or separation of powers.

In contrast, history shows that limiting Congress's Fifteenth Amendment power would pose significant risks and that gains in voting rights are fragile and tenuous. The framers of the Fifteenth Amendment "fully realized that enfranchisement required practical safeguards against evasions of the law and retrogression." Kousser, *Voting Rights Act and Two Reconstructions*, at 137. One of the central lessons of the Reconstruction period is that "revolutions and advances in popular rights and democratic rights can be reversed; that history can move backward; that enormous gains can be lost and jeopardized, eroded, or diluted, and abridged in spite of the enormous cost that those advances have

made." *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 97th Cong. 2027 (1982) (statement of C. Vann Woodward, Professor Emeritus of History, Yale University). History continued to prove the framers right both with respect to voting rights in particular and equal protection more generally. After the Supreme Court in *Reese*, *Cruikshank*, and similar cases invalidated Fourteenth Amendment legislation and frustrated Fifteenth Amendment legislation on technical grounds, an increasingly passive and Democratic Congress in 1894 failed to pass or reauthorize new enforcement legislation, and the South lapsed into nearly 75 years of Jim Crow. Just as the framers of the Fifteenth Amendment feared, without robust legislation from Congress, hard-won gains were gradually rolled back. *Katzenbach*, 383 U.S. at 310-11.

It took renewed congressional action in the Voting Rights Act before gains in enfranchisement resumed. "Passage of the Voting Rights Act was an important first step in the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote." *Bartlett v. Strickland*, 556 U.S. ___, 2009 WL 578634, at *6 (Mar. 9, 2009). Section 5 of the Voting Rights Act (both as originally enacted and as reenacted) was designed to prevent renewed retrogression. It addresses the same concerns that animated the framers of the Fifteenth Amendment. This Court has observed that "Section 5 was directed at preventing a particular set of invidious practices

that had the effect of 'undo[ing] or defeat[ing] the rights recently won by nonwhite voters.'" *Miller v. Johnson*, 515 U.S. 909, 925 (1995) (quoting H.R. Rep. No. 91-397, at 8 (1969)). "[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). Like the Fifteenth Amendment itself, Section 5 focuses not only on the current exercise of the right to vote, but also on ensuring that rights currently held are not eroded in the future.

It was not until after Congress enacted the Voting Rights Act of 1965 that the dream of equality at the core of the Fifteenth Amendment began to become a reality. This Court's decisions upholding Congress's renewed enforcement efforts have enabled Congress to make significant progress in reversing decades of neglect and fulfilling the promise of racial equality. *See Lopez v. Monterey County*, 525 U.S. 266 (1999); *City of Rome v. United States*, 446 U.S. 156 (1980); *Katzenbach*, 383 U.S. 301. Congress has now once again concluded, after holding extensive hearings and gathering voluminous evidence, that discrimination against voters on the basis of race or color is far from eradicated and that the rights protected by the Amendment are still sufficiently fragile to require renewal of Section 5 and other provisions of the Voting Rights Act. The Fifteenth Amendment's history and this Court's decisions require that Congress's determination be given

special deference and that NAMUDNO's challenge be rejected.

CONCLUSION

For the foregoing reasons, the decision of the United States District Court for the District of Columbia should be affirmed.

Respectfully submitted,

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